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In the Supreme Court of the United States

October Term, 1949

No. 507

DAWSON COUNTY, MONTANA and PRAIRIE COUNTY, MONTANA,

Petitioners,

vs.

MARY HAGAN, E. B. CLARK, MINNIE R. EVANS, UNITED STATES OF AMERICA, EDNA YALE, ALLEN W. YALE, RUBY YALE, RUTH PETTERSON, HANS PETTERSON, and SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED,

Respondents.

Petition for a Writ of Certiorari

to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment of said court affirming in part the judgment of the United States District Court for the District of Montana in the above entitled action and respectfully show to this Honorable Court:

JURISDICTION

Jurisdiction of the district court was invoked under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. Sec. 257 and the act of October 14, 1940, 54 Stat. 1119. The jurisdiction of the United States Circuit Court of Appeals rests upon 28 U. S. C. Sec. 1291. Jurisdiction of this court rests on 28 U. S. C. Section 1254: (1)

STATEMENT OF THE CASE

This proceeding was brought by the United States to condemn 5,788.21 acres of land in Dawson and Prairie Counties, Montana (R. 4-11). On March 27, 1944, the United States filed a declaration of taking and deposited $32,389.00 as estimated compensation (cf. R. 89-90). Mary Hagan and others, for themselves and all bondholders of the Upper Glendive-Fallon Irrigation District, filed an answer and counterclaim alleging that they had a lien on the property (R. 28-42). Dawson County filed a claim asserting tax title to the lands in that county and asking distribution of $23,526.00 of the deposit (R. 43-64, 65-66) and an order was entered for the distribution to it of $10,628.57 (R. 67-68). On December 5, 1945, a "Final Judgment in Condemnation" was entered, fixing the value of the property at $32,389.00, of which $23,526.00 was for the lands in Dawson County (R. 78-90), and $7680.00 for the lands in Prairie County.

Thereafter, Dawson County filed a petition for distribution of the balance of the deposit for its lands, or $12,897.43 (R. 9-93) and the bondholders filed a petition for distribution of $22,677.81 and for an order requiring Dawson and Prairie Counties to refund to the court $3,315.06 and $327.86, respectively, by which amounts the distributions already made to them were alleged to have exceeded their proper claims (R. 94-95).

On September 4, 1947, the court held that overpayments had been made to the counties as alleged. It ordered the counties to return the overpayments to the registry of the court and entered judgment requiring the United States in the meantime to pay into court the sum of the overpayments, $3,642.92, giving it the right to recover the same from the counties (R. 98-109).

Dawson County appealed (R. 110-111) and the bondholders cross-appealed (R. 115-117). The Court of Appeals reversed the judgment and remanded the cause with directions to make findings of fact and conclusions of law and then enter such judgment as might be proper (R. 131-132). Dawson County v. Hagan, 172 F. 2d 387.

On November 24, 1948, the district court filed findings of fact, conclusions of law and judgment (R. 142-157).

On September 26, 1949, the Circuit Court of Appeals filed its opinion reversing the judgment as to the District Court's order directing the United States to pay any additional sum into Court (R. p 181) and further provided the counties were not overpaid in the amount equal to the unpaid general taxes. Except as modified the judgment was affirmed judgment in accordance with the opinion was filed and ordered September 26, 1949 (R. p 182-183).

The petition for rehearing filed by the appellant counties was denied on November 1, 1949 (R. p 183).

The opinion filed by the Circuit Court of Appeals for the Ninth Circuit has been reported. 177 Fed. (2) 186.

The basis of the action brought by the United States to condemn the lands of the petitioners is the following statement of facts showing the purpose of the action to condemn.

In March, 1940 the Farm Security Administration, an agency of the United States, began proceedings with the Boards of County Commissioners of Dawson and Prairie Counties looking to the purchase of the tax deed lands owned by the respective counties, and on September 5, 1940 Dawson County sold its lands, 4164.69 acres, for the gross sum of Twenty-three Thousand Five Hundred Twenty-six and 00/100 Dollars ($23,526.00). Under this sale option the United States went into possession of the lands described and removed fencing, buildings and other obstructions in order to develop the lands under the joint plan of the Bureau of Reclamation and the Farm Security Administration, under the newly organized Buffalo Rapids Irrigation District within which all of said lands were to be included. The public corporation hereinabove named was organized on March 19, 1938, including 17,000 acres of land to be developed by new canals and laterals, under the Bureau of Reclamation and the presidential letter of June 16, 1937 in which the plan of construction was outlined. At the time of the creation of this corporation all of the lands involved in the Upper Glendive-Fallon Irrigation District were eliminated on account of the lack of title by the counties, the tax deed proceedings not having been completed.

The Declaration of Taking filed in this action on April 27, 1942 vested title in 5788.21 acres of land, formerly a part of Dawson and Prairie Counties, Montana, in the United States of America under Section 258a, Title 40, U. S. C. A. The compensation deposited in the registry of the Court amounted to $34,489.00, with valuations on the tracts described therein as follows:

Dawson County, Montana	4164.69 acres	$23,526.00
Prairie County, Montana	1309.60 acres	7,680.00
Robert Henderson estate	158.60 acres	2,100.00
Edna Yale	103.55 acres	758.00
Scottish-American Mortgage Co.	51.77 acres	425.00

The Declaration was made by the Secretary of Agriculture and was recorded in the two counties, as well as being filed in Court, with maps of all of the separate tracts therein described attached thereto. With the exception of the Robert Henderson estate lands, the Edna Yale tract and the Scottish-American Mortgage Co. tract, the lands were all a part of the Upper Glendive-Fallon Irrigation District, created as a public corporation of Montana on December 20, 1920 and never legally dissolved, although not functioning as such under the laws of Montana since 1927. Commissioners were appointed by the District Court and qualified as such and thereafter levied assessments for the maintenance and operation of the District by resolution passed in conformity with Chapter 148, Laws of Montana 1921, fixing the irrigable

area in each forty-acre tract in said District and levying assessments on such tracts as by law provided. No other or further resolution was ever passed by the Board of Commissioners changing the irrigable area of the lands in the District, and the same became fixed, under the provisions of Chapter 157, Laws of Montana, 1923, Page 477. After these assessments were levied for operation and maintenance a bond issue was authorized and approved by the District Court on December 2, 1922 and in the order confirming the bond issue, provision was made for the levy of assessments for the payment of interest and principal of the bonds. Of the issue of $150,000 authorized there were sold to the public $81,500, the principal of which is still outstanding and unpaid, as well as accrued interest since January 1, 1928. The funds were to be used in purchasing a pumping plant, a coal mine, and for the construction of canals and laterals to irrigate the lands in said District under two lifts, a forty-foot lift and a seventy-five foot lift, neither of which lifts ever successfully functioned.

QUESTIONS PRESENTED:

I.

The ultimate question is whether the petitioners as the legal owners of the lands taken in condemnation by the United States as a matter of law are entitled to the funds deposited in court as just compensation in lieu of the lands taken on the facts specifically found by the District Court and affirmed by the Circuit Court of Appeals, where the respondents had no lien on the lands taken at the time of the filing of the Declaration of Taking by the United States.

II.

Specifically the court erred when it found "that Dawson County and Prairie County, were each paid under orders entered July 11, 1944, the full payment of general taxes and neither of said counties have any further claim on any compensation awarded or on deposit herein." (R-155).

III.

The judgment of the District Court affirmed in part by the Circuit Court of Appeals was in error when it decided, "That the sum of $17,851.89 being the balance remaining on deposit with the Registry of this Court be paid to the bondholders of the Upper Glendive-Fallon Irrigation District pro-rata," (R-156) such funds being in lieu of the lands taken from petitioners and deprives them of their money and is a taking of their property without just compensation for public use in violation of the 5th Amendment to the Constitution of the United States.

REASONS FOR THE PETITION:

The Writ prayed for should be issued for the following reasons:

I.

The Circuit Court of Appeals decided an important question of local law namely the payment of just compensation in a condemnation action to respondents who had no claim to the funds representing the purchase price of the lands taken, contrary to the applicable decisions of the Montana courts, thus completely ignoring the local law as determined in all decisions of the Montana Supreme Court upon the question.

II.

The decision of the Circuit Court affirming the District Court sets a precedent as to a fundamental question of local law in a way directly in conflict with the applicable decisions of the Montana courts namely: State ex rel Malott v. Board of Commissioners, 89 Montana 37 296 Pacific 1, in which it was pointed out that the lien of the respondent bondholders was extinguished by the tax deed to the County and further that the bondholders occupied the same status as a mortgagee as to payment of general taxes or loss of their security.

III.

The judgment of the Circuit Court of Appeals in affirming the judgment of the District court decided an important question of constitutional law, in awarding a part of the price of the lands taken by the United States to the

respondents who had no claim on the lands and hence on the funds which were deposited in the Registry of the Court in lieu of the lands taken, which judgment is a taking of the property of the petitioners for public use without just compensation in violation of the 5th Amendment to the Constitution of the United States.

IV.

The judgment awarded to the petitioners the amount of their general taxes only, which were merged in the title to the lands taken by tax deed and no longer existed as taxes. The fee to the lands passed to the petitioners free and clear of all liens, and incumbrances, including prior tax liens and the lands were not subject to future taxation for irrigation assessments under the decisions of the Supreme Court of Montana which decisions govern the Federal Courts in matters of Montana law and procedure.

WHEREFORE: your petitioners pray that a Writ of Certiorari issue to the Circuit Court of Appeals for the Ninth Circuit to review the said cause and petitioners submit herewith a certified transcript of the record below together with their supporting brief to sustain this petition.

Respectfully submitted:

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E. W. POPHAM

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CECIL N. BROWN

Attorney for Prairie County.

Brief of Petitioners

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OPINION BELOW

The views of the District Court are stated in its Decision and Order (R 98-109) which has not been reported. Appeals were taken by adverse claimants to the condemnation award from such judgment to the Circuit Court of Appeals for the 9th Circuit, which Court in its per curiam opinion filed on November 1st, 1948, (172 Fed (2) 387) remanded the case to the District Court with directions to make findings of fact, state conclusions of law and enter a proper judgment.

The District Court in accord therewith filed its findings and entered judgment on November 24, 1948. All parties appealed from the judgment and on September 26th, 1949, the Circuit Court of Appeals for the 9th Circuit filed its per curiam decision reported (177 Fed (2) 186).

JURISDICTION

The Judgment entered by the Circuit Court of Appeals for the Ninth Circuit being a final judgment, reported in (177 Fed (2) 186), jurisdiction of this Court to review the proceedings below is invoked under Section 1254, Title 28 U. S. Code.

QUESTIONS PRESENTED

The petitioners as the owners of the lands taken in a condemnation action claim all of the compensation award: 1st—By agreement of the petitioners and the United States, the acreage to be taken by the United States was fixed as a whole for a fixed sum.

2nd—The respondent bondholders had no lien on the lands taken and hence no claim on the compensation award which took the place of the lands.

3rd—The taxes of the petitioners were merged in the tax deeds taken by them to the lands and no longer existed as taxes and the title of petitioners was free of all liens and encumbrances at the time of the filing of the Declaration of Taking by the United States, entitling petitioners to the purchase price of the lands taken.

4th—Petitioners as owners of the lands taken are entitled to the compensation awarded in lieu of the lands and the judgment awarding a part of the award to respondents is a taking of petitioners property without just compensation contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

ERRORS ASSIGNED

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court, finding that petitioners were paid the full amount due them under orders of said Court entered July 11th, 1944, (R-155) is erroneous in that the funds on deposit in the registry were the agreed price of sale of the lands to the United States and not subject to division into acreages or values as the petitioners and the United States had agreed on the terms of the sale and such agreed price became binding on both parties in this condemnation action which was brought by the United States to quiet title (R-104-105).

Petitioners title to the lands involved was free and clear of all liens and encumbrances under Montana Law (R-101) and respondents had no claim to the funds deposited herein in lieu of the lands, respondents having failed to protect their rights in the lands in the many ways provided by Montana Law the award made by the judgment (R-156) affirmed in part by the Circuit Court of Appeals for the Ninth Circuit is erroneous in taking the money belonging to petitioners which in this action is the agreed purchase price of their lands, such taking being contrary to the Fifth Amendment to the Constitution of the United States.

The conclusion number one of the District Court (R-152) is erroneous as a statement of law upon which the judgment entered paragraph one (R-155) can be entered, the said decisions cited in support thereof and as grounds therefore are based upon a "dictum" of the Supreme Court of Montana in which case the said question was not before it for decision, such judgment as affirmed by the Circuit Court of Appeals for the Ninth Circuit being an unwarranted precedent awarding a part of the purchase price of tax deed lands sold by petitioners to the United States to respondents who had no lien on the lands and no legal claim on the funds deposited as the purchase price thereof. Such a precedent should not be established on the law and facts herein.

SUMMARY OF ARGUMENT

(a) The distribution ordered in the judgment entered awarding the remaining funds in the registry of the Court to the bondholders was based upon dicta in a decision of the Supreme Court of Montana in a case where the Court suggested a method of disposition of the funds derived from the sale of the tax deed lands by the county. The Court itself stated the matter was not then before it for decision, and the case is not authority for the conclusions adopted by the trial Court in its judgment.

(b) The judgment entered awarding the funds to the bondholders representing just compensation is a collateral attack on the tax title to these lands owned by the counties and sold to the United States. Such an attack is contrary to the decisions of the Supreme Court of Montana relating to tax deed titles.

(c) The United States and the counties stipulated on the value of the tax deed lands purchased by agreement between them in which the acreage was fixed and no division of such acreage was made by the parties into tracts. Such agreement and stipulation is binding upon both parties.

(d) The bondholders invested in lands subject to general taxation and in order to protect such investment were by law obligated to see that the general taxes levied in each year were paid or the lands redeemed from the tax sale or the bondholders could purchase the outstanding tax sale certificate and take tax title to the lands.

(e) Under Montana law the tax title of the counties was an independent grant from the sovereign and the lands were free from all prior liens and encumbrances including prior tax liens.

(f) The equity rule followed by the Court below does not apply in this case as the award of just compensation is payable only to the owner of the land. The same being free and clear of all encumbrances and liens by the taking of the tax deeds, under Montana law and decisions.

(g) The judgment entered herein sets a precedent on a point of fundamental law not passed upon by the Supreme Court of Montana in its decisions or enacted by Montana Statute Law. The award to bondholders of part of the sale price of the lands taken by the United States of America where they had no lien on the lands under Montana law, if followed, would require the distribution of a part of the sale price of tax deed lands sold by the Counties to be paid to all holders of liens of record prior to the tax deeds which is contrary to express holdings of the Supreme Court of Montana.

ARGUMENT

We call attention to the case (R page 152) relied upon by the bondholders and adopted by the Court in its findings. State v. Board of Commissioners of Cascade County, 89 Montana 37, (1931) 296 Pacific 1. At the outset we call attention to the statement of our Supreme Court on points 17 and 19 thereof as follows:

"The decision of a court in any case should be read in the light of the precise question then under consideration. Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. This court, speaking through Mr. Chief Justice Callaway, in the case of State ex rel. Walker v. Jones, 80 Mont. 574, 261 P. 356, 360, 60 A. L. R. 551, said: 'It is the rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration'—citing Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368. And again, in the case of Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 81 Mont. 222, 262 P. 1039, 1047, this court said: 'In considering the meaning and intent of the language of an opinion one must have constantly in mind the facts of the case in which the opinion is written. For, as Chief Justice Marshall observed, it is impossible so to use language as that general expressions apply in every instance with the same meaning to every condition of facts'—citing Chater v. San Francisco Sugar Refining Co., 19 Cal. 220."

This case was followed in Edquest v. Tripp and Dragstedt, et al., 93 Montana 446 (1933).

In the case above quoted the Montana Supreme Court had before it for decision this question only whether or not the lien of irrigation district bonds is a general obligation of the irrigation district or merely a charge against the lands within the district and the holding in that case reversed the former decisions of the Supreme Court in the Case of Cosman v. Chestnut Valley Irrigation District, 74 Montana 111, 239 Pacific 879, 40 A. L. R. 1344 (1925).

After determining the matter at issue, the Court went on to say at page 95, Volume 89, Montana Reports:

> "It has been suggested by counsel for respondents that the county hold title to these lands as a trustee. While this matter is not directly before the court for determination, yet we observe in connection therewith that, when the county acquires these lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates."

The statement of the Court above set forth shows clearly what can happen in a case where the Court endeavors to express its views on matters not before it for decision. In connection with this statement above referred to this Court in the case of Judith Basin Irrigation District v. Malott, 73 Fed. 2nd 142, (1934) 97 A. L. R. 508, made the following pertinent statement:

> "The Supreme Court of Montana in State ex rel. Malott v. Board of County Commissioners, 89 Montana 37, 296 Pacific 1, expressly overruled its previous decisions and decided irrigation district bonds were not the general obligation of the district, but merely a charge against the lands within the district, and that each tract of land was only liable for its proportion of the entire bonded indebtedness. It was also held in that case that when the land had been sold for taxes and when conveyed to the county by tax deed and subsequently sold by the county, as provided by law, that the purchaser acquired the lands free and clear from any lien of the bonds or any future taxation for the payment thereof."

Citing Section 7232 of the Rev. Codes of Montana,

as to the duty to assess the tax annually for the payment of the bonds and at page 514, in 97 A. L. R. point No. 8, "we also suggested that the question of the disposition of the funds derived by the sale of the lands deeded to the county for the State, county and irrigation district taxes suggested by the Supreme Court of Montana in its dictum in the case of State ex rel. Malott v. Board of County Commissioners, supra, was in conflict with the statutory rule Revised Code of Montana, 1921, Section 2235 Subdivision 1, as amended by laws of 1927, Chapter 85, Section 3, in relation thereto.

In the case above quoted, the same question was before the Circuit Court, as was before the Supreme Court of Montana in the case known as the Malott Case, 296 Pacific 1, 89 Montana 37. Subsequent to this decision, which was never appealed to the Supreme Court of the United States for final decision, the United States Supreme Court in the case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 SCt 817, 82 LEd 1188, 114 ALR 1457 (1938) held contrary to the Circuit Court's decision in the Judith Basin v. Malott case above referred to, the holding being:

> "The phrase 'laws of the several states,' as used in statute requiring federal courts to apply laws of the several states except in matters governed by federal Constitution or statutes held to include not only state statutory law, but also state decisions on questions of general law, in absence of any constitutional provision purporting to confer upon federal courts power of declaring substantive rules of common law applicable in a state."

This doctrine is followed in the Montana case of Toole County Irrigation District v. Moody, 125 Federal (2nd) 498 (1942).

The Court should not adopt the "dictum" of the Supreme Court in the Malott case herein before cited, as to such doctrine the Montana Courts have held:

> In the case of the Empire Theatre Company v. Cloke et al., 53 Montana 183, 163 Pacific 107. (1917.) "An obiter dictum is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."
>
> Mettler v. Ames Realty Co., 61, Montana 152, 201 Pacific 702. (1921.) "Observations made during the course of an opinion upon a subject not involved in the case do not require explanation and are not binding upon the Court." At page 165 the Court says, "The language of Honorable Simeon E. Baldwin is particularly pertinent here: 'If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.'" (Citing 18 Yale Law Journal pages 1-8 inclusive.)
>
> "All that is necessary to make a decision of this Court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered." Spratt v. Helena Power Transmission Company, 37 Montana 60, 94 Pacific 631. (1908.)
> We quote from 14 Am. Jur. 295, Section 83, "The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside the record or on points not necessarily concerned therein.

Such expressions being obiter dicta do not become precedents." Citing State ex rel. Walkel v. Jones, 80 Montana 574, 261 Pacific 356, 60 A. L. R. 551. (1927.)

In the case of Hawks v. Hamill (1933), 288 U. S. 52, 77 L. Ed 610, 53 Supreme Court 240, Justice Cardozo observed: "An opinion may be so framed that there is doubt whether the part it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum. But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely obiter. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement.

In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissable is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot." See also quoting with approval Blue Valley Creamery Co. v. Consolidated Products Co., 1936, CCA 8th 81 Fed. 2nd, 182.

The Court in Carroll v. Carroll, 1853, 16 How U. S. 275, 14 L. Ed 936 held that the duty of the Federal Courts to follow state court decisions extends only as far as the rules of stare decisis permit, and since dicta i.e. expressions not necessary to the actual decision of the controversy before the Court have no value as binding precedents in common law Courts, a Federal Court is not required to follow dictum in a State Court decision.

The Malott case was not followed by any other case reported as to the trustee doctrine where the county acquires

title to lands through tax deeds. It was, however, mentioned in other cases such as River Farms of California v. Gibson, County Treasurer, 42 Pacific 2nd 95 (1935). By statute, the county treasurer was creating a trustee of the irrigation district funds as well as for sale and for redemption of the lands from tax liens. The case cites with approval the doctrine of the Supreme Court of Montana in the Malott case but an examination of the facts and matter for decision before the California Court and Malott case facts and the doctrine set forth therein are entirely different.

In the Utah case, State v. Salt Lake County, 85 Pacific 2nd 858 (1938), the Utah Court refused to follow the doctrine of the Malott case in the following language:

> "Court decisions are authoritative only upon questions of law or facts actually presented, discussed and decided."

In a subsequent decision of the Supreme Court of Montana, State ex rel. Malott v. Cascade County, 22 Pacific 2nd 811, 94 Montana 394 (1933), in which the sole question was the right of the county treasurer to assign tax certificates of sale to a private person who purchased to take tax title to the land and wipe out the lien of irrigation district bonds. The Court held this could not be done, and in its decision cited the Malott case 89 Montana 37, 296 Pacific 1, with approval, but in its decision it referred to debenture certificates which in this particular case had been issued by the county to the irrigation district. In this case

now before this Court there were no debenture certificates involved. The decision above referred to specifically holds:

> "If the land would sell for an amount in excess of the taxes and assessments * * *"

This, of course, was impossible in the instant case. The compensation deposited for the Dawson County lands being $23,526.00, and for the Prairie County lands, $7680.00, which were the amounts for which the counties agreed to sell the lands to the United States. Unpaid irrigation assessments totalled $41,662.98, so that the case is not authority for the trustee doctrine. The statement made pertaining to the irrigation district assessments was not before the Court for decision.

THIS ACTION WAS BROUGHT TO QUIET TITLE

This action was brought and completed to quiet title to the lands as a means of giving the United States a complete and immediate title and possession under the provisions of the Federal Code. The fee was vested in the United States upon the filing of the declaration of taking, the method of payment adopted was by agreement. The condemnation action and award followed the original agreement.

The legal procedure of condemnation was used as a means of determining to whom payment should be made, as well as giving the United States superior rights to the land that could not be obtained under State law as any judgment in a Montana action to quiet title where defendants

are served by public process does not become final until one year after the entry of the decree under the provisions of Section 9187 Revised Codes of Montana 1935.

The bringing of an action to condemn merely for the purpose of quieting title would not alter or change the original agreement of the parties so that the division of the lands into tracts was merely for the convenience of the agencies of the United States who took possession of the land and used it for their purposes. Bank of Edenton v. United States, 4th Circuit, 152 Fed. (2d) 22 1-4, Danforth v. United States, 308 U. S. 271-282, Oliver v. United States, 156 Fed. (2d) 281-282.

> In the Danforth case above cited, "An offer by United States officer to purchase perpetual flowage easement over land for specified amount, in connection with flood control program, mentioning desire to consummate the purchase by friendly condemnation proceedings, was, when accepted, an agreement to fix the price of the easement at the named figure, and was binding in subsequent condemnation proceeding, notwithstanding attempt of the government to withdraw the offer after acceptance."

The lower Court in its decision and order on September 4, 1947, pages 98 and 99 of the Transcript on Appeal makes this statement:

> "The lands embraced in this action were acquired by the Government through an agreement which included total acreage of the purchase and consideration therefor, and also through condemnation proceedings, wherein declaration of taking was filed, (sec. 258a, Title 40, U. S. C. A.), and commissioners were appointed by

> the court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded as just compensation for the same total acreage the same amount of money as had theretofore been agreed upon between the Government and the defendants herein, Dawson and Prairie Counties, which sum was thereafter deposited in the registry of the court.

Our contention is that the counties, after the signing of options to the Government, and stipulating with the Government for the purchase price of the acreage to be taken were in no position to file in the condemnation action any pleading making changes nor in any way abrogating the contract and agreements made, nor can they seek to have the commissioners appointed appraise the land at any greater value by means of appraising tracts where the total value would exceed the agreed price between the United States and the counties. There could and has been no division of the consideration for the acreage sold.

COLLATERAL ATTACK

Under our Court decisions after the taking of lands by tax deed, all liens and encumbrances have been extinguished, including prior tax liens. The bondholders are in such a position now and since the counties obtained the lands by tax title no attack can be made except by direct action. Here the Court's order of distribution is a collateral attack on the tax title as an attempt is made to give part of the just compensation agreed upon and deposited in the registry of the

Court to appellees who had no lien on the lands or from the funds deposited.

On collateral attack our Court has said in Richardson v. Lloyd et al., 90 Montana 127, 300 Pacific 254 (1931), quoting from page 132, Montana Reports:

> "A tax deed operates to divest the original owner of his title to the land. (Sec. 2215, Rev. Codes 1921.) Though subsequent in time, it is paramount in right over the title of the mortgagors, and extinguishes all former titles. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pacific 638.)
> The general rule is that a tax title cannot be assailed collaterally, but must be attacked, if at all, in a direct action. (37 Cyc. 1490, note 84; 4 Cooley on Taxation, 4th ed., sec. 1408; West v. Negrotto, 52 La. Ann. 381, 27 South, 75; State Mortgage Corp. v. Traylor, (Tex. Civ. App.) 32 S. W. (2d) 887.)"

In the case of Smith v. Whitney, 105 Montana 523, 74 Pac. 2d 450 (1937), our Court makes this statment:

> "No person may question the validity of a tax sale or deed unless he can first show that he, or those under whom he claims had some title to the property at the time of the sale."

Citing 26 RCL 446, Goldsbury v. MacConnell, 73 Colo. 35, 215 Pac. 872, Hopper v. Chandler, 183 Ark. 469, 36 S. W. 2d 398.

TAX DEED EXTINGUISHES RESPONDENT'S LIEN

The appellee bondholders are in the same position as a mortgagee who loans money on lands and is compelled to pay the general taxes assessed against the lands or lose his security.

> "In the case of State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, quoting from page 93: 'Under the provisions of section 1928, the school funds of this state may be invested "in first mortgages on good improved farm land in the State of Montana." But, if a loan is made of school funds upon farm lands, the lands are still subject to taxation, and the State of Montana is obliged to protect its loan by the payment of the taxes levied against the land, or suffer the loss of its security through the taking of a tax deed. The bondholders are in the same situation, and may protect their security by either paying the taxes or redeeming the land at any time prior to the expiration of the period for redemption.' "

AGREED PRICE BINDING IN CONDEMNATION ACTION

The Court found that the counties had offered their tax deed lands to the United States for fixed sums to be paid them for the acreages taken (R pages 103 and 104) and the division into tracts was made by the agents of the Government for their convenience, and made this statement:

> "Where the purchase price of property has been agreed upon by the owner and the Government, and the latter should thereafter commence condemnation proceedings, the price agreed upon is still binding upon both parties. Bank of Edenton v. United States (4 Cir.), 152 Fed. (2d) 251-4; Danforth v. United States, 308 U. S. 271, 282; Oliver v. United States, 156 F. (2d) 281, 282;"

The following cases support our case relating to contracts entered into with the Government fixing compensation:

Muschany v. United States, 324 U. S. 49, 89 L. Ed. 744;
Danforth v. United States, 308 U. S. 271-282, 24 L. Ed. 240, 60 Supreme Court 231;
Bank of Edenton v. United States (4 Cir.), 152 Fed. (2d) 251-4;
United States v. North Carolina, 136 U. S. 211, 34 L. Ed. 336;
United States v. Rogers, 255 U. S. 163-169, 65 L. Ed. 566, 41 Supreme Court 281;
Seaboard Airline v. United States, 261 U. S. 299, 305, 67 L. Ed. 644;
Smyth v. United States, 302 U. S. 329, 82 L. Ed. 294.

The question before the District Court was whether the bondholders had a lien upon the lands at the time of the filing of the Declaration of Taking on April 27th, 1942, title to said lands having passed to the petitioners by tax deeds taken in 1931 and 1939.

The disposition of the compensation deposited in the registry of the Court was the sole question for decision herein involving questions of law only.

The Montana Supreme Court has decided the ultimate question involved in this action against the bondholders respondents herein. In the case of Jensen Livestock Co. v. Custer County, et. al., 113 Mont. 285 (124 Pac. (2d) 1013), as follows:

"But a tax deed is not derivative, but creates a new title in the nature of an independent grant from the

> sovereignty, extinguishing all former titles and liens not expressly exempted from its operation. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638; State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1; Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 Mont. 465, 58 Pac. (2d) 765.) It is not derived from the fee, but is antagonistic to it and there is no privity between the holder of one and the holder of the other. (Horsky v. McKennan, 53 Mont. 50, 162 Pac. 376.)"

This rule is followed generally throughout most of the states, and in 51 American Jurisprudence, Section 1078, Page 937, the rule is stated as follows:

> "As a general rule, in jurisdictions where the tax is a charge on the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem, the title conveyed by the tax deed pursuant to a valid sale of land for non-payment of taxes is not merely the title of the person who was assessed for the taxes and neglected to pay them, but is a new, complete, and paramount title to the land in fee simple absolute, created by an independent grant from the sovereign, which extinguishes all prior titles, rights, interests, and encumbrances of private persons and all equities arising therefrom, not expressly exempted from its operation, although owned or held by persons not liable for the tax or who were not in default for not paying it."

The bondholders had the right to protect the statutory lien of their bonds by paying the general taxes assessed for state, county and school district purposes; failing to do so, their liens is extinguished by taking of a tax deed by petitioners.

CONCLUSION

The finding of the District Court (R p. 152) followed by judgment in support thereof is erroneous under the facts and law of the case. There were no debenture certificates issued to the irrigation district in this case and hence no interest in the land that would survive the tax deeds taken by petitioners.

The Montana case cited in support of the conclusion of law of the District Court is predicated on the issuance of the debenture certificates and where the irrigation district failed to enforce its rights under the law and allowed all of its legal remedies under Montana law to expire and took no action whatsoever under the laws of Montana, then the conclusion of the Montana Supreme Court in the Malott Case (89M-37) (296Pac. 1) is unescapable that the lien against the lands for irrigation assessment was lost by the tax deed proceedings.

There is no trustee doctrine here as the foundation for such a holding depends on compliance with the laws of Montana, none of which were invoked by the respondents.

They have signally failed to protect any interest or claim they may have had and now seek to secure a distribution of an award made to petitioners by contract with the United States as to amount of compensation to be paid for the lands taken. To take the consideration for these lands taken by condemnation at an agreed price from the petitioners is a taking of their property contrary to the Fifth Amendment

to the Constitution of the United States.

There are no authorities supporting the division of the award to respondents who were without legal right to the same as lienholders or otherwise.

There never has been any distribution of funds derived from tax deed lands sold by the counties of Montana to any holder of a lien on the tax deed lands which was under Montana law extinguished by the taking of tax title. There are no precedents for the judgment herein or the action taken and no statutory provisions authorizing such action.

The facts of this case do not furnish a foundation for the trustee doctrine adopted by the Court in its conclusion of law No. 1 (R p. 152). This is followed by conclusion No. 2, which is contrary to the statute law of Montana, Chapter 63 of the Laws of Montana, 1937, was expressly held by the Supreme Court of Montana to be prospective and not retroactive.

State Ex rel Osten v. Billings 91 Montana 76
5 Pac (2) 562 (1931)
Cascade v. Weaver 108 Montana 1
96 Pac 2 164 (1939)
Hastman v. City of Bozeman 116 Montana 392
154 Pac (2) 279 (1944)

No assessments were made in this case after the issuance of the tax deeds to the petitioners.

Respectfully Submitted,
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